No. 05-989

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In The

Supreme Court of the United States

DENNIS LEE HENDRIX, EARL A. SINGLETARY and DAVID W. WATERS,

Petitioners,

v.

DANNY M. BENNETT and DANNY L. REID,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in adopting the objective "ordinary firmness" test as the standard for evaluating the "adverse action" element of First Amendment retaliation claims.

2. Whether the law was "clearly established" where the Eleventh Circuit had long applied an objective test in First Amendment retaliation cases, but had not yet affixed the "ordinary firmness" label to that test.

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INTRODUCTION

The U.S. Court of Appeals for the Eleventh Circuit adopted the "ordinary firmness" test to determine whether governmental action is severe enough to constitute "adverse action" for purposes of a First Amendment retaliation claim. Under this test, "adverse action" is present where retaliatory conduct is severe enough that it would likely deter a person of "ordinary firmness" from engaging in protected activity. The Eleventh Circuit's ruling follows similar decisions in virtually every other Circuit, which have already adopted the "ordinary firmness" test. It is also consistent with earlier Eleventh Circuit decisions in which that Court applied an objective test without attaching the "ordinary firmness" label. As the Eleventh Circuit observed:

> [T]he courts . . . have called the "ordinary firmness" test "well established," *Garcia*, 348 F.3d at 728, "widely accepted," *Tbolasprashad*, 286 F.3d at 585, and "settled law," *Keenan*, 290 F.3d at 258.[1]

Faced with the widespread acceptance of the "ordinary firmness" test, Petitioners attempt to conjure a "circuit split" where none exists. They argue that the Eleventh Circuit should have applied a subjective test that requires a plaintiff to prove an "actual chilling" of his First Amendment rights, and suggest that the Circuits are riven over the "subjective" versus "objective" dichotomy. In actuality, at most, there is uncertainty in the Second Circuit as to whether it will apply the "ordinary firmness" test to all First Amendment retaliation claims, or only to retaliation claims by prisoners and public employees.[2] As the Eleventh Circuit noted, however, that is a nuance to be resolved by the evolving case law of that Circuit.[3]

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[1] Pet. App. 8a.

[2] *See*, Section I, D, *infra*.

[3] *See*, Pet. App. 19a, n. 5, where the Eleventh Circuit observed:

> We note that cases from the Second Circuit appear to take contradictory positions. *Compare Washington v. County of Rockland*, 373 F.3d 310, 320 (2nd Cir. 2004) (objective standard)

(Continued on following page)

Moreover, the reasons that the "ordinary firmness" test has become so widely accepted are that it is: (1) consistent with this Court's precedents, (2) rooted in sound policy factors, such as the need to ensure that guilty officials do not escape punishment, and (3) susceptible to judicial application in a consistent manner. Therefore, despite Petitioners' pleas, this Court does not need to intervene to stem the salutary effects of the "ordinary firmness" test on First Amendment jurisprudence. There is already virtual unanimity among the Circuits on this issue.

Petitioners also argue that the law was not "clearly established" when they retaliated against Respondents, and therefore they are entitled to qualified immunity. For qualified immunity purposes, the law is "clearly established" if, in light of preexisting law, it would be apparent to a reasonable officer in the defendant's circumstances that his conduct was unlawful. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Petitioners contend that the law regarding the "adverse action" element of First Amendment retaliation claims could not have been "clearly established" because the Eleventh Circuit had not yet adopted the "ordinary firmness" label, even though it had long applied an objective standard to this issue.[4] *Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004); *Ga. Assn. of Educators v. Gwinnett Co. School Dist.*, 856 F.2d 142 (11th Cir. 1988); *Cate v. Oldham*, 707 F.2d 1176, 1186 (11th Cir. 1983). However, this argument is dispelled by the District Court's factual findings regarding Petitioners' retaliation. On remand from the first interlocutory appeal on qualified immunity in this case, the District Court wrote:[5]

> The actions allegedly taken by the Defendants include ordering deputies to follow the Plaintiffs

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with Curley v. Village of Suffern, 268 F.3d 65, 73 (2nd Cir. 2001) (subjective standard). We leave it to that Court to settle this disparity.

[4] *See*, further discussion of 11th Circuit cases in Respondents' 11th Cir. Brief at 37-41.

[5] Pet. App. 30a-32a.

> for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; unlawfully accessing county and state records to obtain confidential information regarding the Plaintiffs to be used for harassment; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds . . . The testimony of Mark Thomas, a former major with the Department and a member of Sheriff Hendrix's command staff, suggests that Hendrix targeted the Plaintiffs for surveillance. (Thomas Dep. at 38-39, 45, 103). The testimony of William Miller, a former lieutenant during Hendrix's term, indicates that Hendrix stated that he would require Miller to investigate 50 to 75 residents who might be opposed to Hendrix's reelection. (Miller Aff. Pars. 7-13). Miller also stated that there was no indication that any of these residents were suspected of any criminal activity or other legitimate basis for such investigations . . . The Defendants' harassment and surveillance of the Plaintiffs fall squarely within the retaliatory conduct clearly proscribed by the settled case law of the Supreme Court and the Eleventh Circuit. *Terminiello v. Chicago*, 337 U.S. 1 (1949) at 4; *Georgia Assn. of Educators*, 856 F.2d at 145; *Leslie*, 786 F.2d at 1537; *Cate*, 747 F.2d at 1186. ***Indeed, it is difficult, if not impossible, to fathom that a reasonable officer in the Defendants' position would not recognize that retaliatory surveillance and harassment of political opponents under color of law was a violation of their constitutional rights.*** (Emphasis supplied.)

In its earlier summary judgment order, the District Court described Petitioners' retaliation in even greater detail:[6]

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[6] R14-176-4.

> The actions allegedly taken by Sheriff Hendrix include ordering deputies to follow the Plaintiffs for surveillance purposes; ordering deputies to regularly "stake out" Plaintiff Bennett's residence; on two occasions stopping Plaintiff Tammy Bennett near her residence without probable cause and issuing false and pretextual traffic citations; unlawfully accessing County and State records to obtain confidential information regarding the Plaintiffs to be used for harassment; maliciously using such information to defame Plaintiffs Reid and Bennett; ordering deputies to harass, intimidate and interfere with Plaintiffs Reid and Bennett in the lawful pursuit of their business interests; and attempting to obtain a warrant for the arrest of Plaintiff Reid on false and pretextual grounds. ***Sheriff Hendrix allegedly announced the formation of a "Strike Force" at a staff meeting on February 9, 1999. The purpose of this special force was to carry out the aforementioned intimidating activities***. (Emphasis supplied.)

These allegations, which the District Court found to be supported by competent summary judgment evidence, answer the ultimate issue regarding qualified immunity. In light of existing Eleventh Circuit and Supreme Court precedents, no reasonable officer could fail to instantly recognize that such egregious conduct was unlawful. Certainly, this Court should not condone or encourage such actions by providing immunity to the responsible officers.

Finally, Petitioners argue that granting certiorari would make this case a nice, final piece of a trilogy that "will allow the Court to cohesively clarify the standards applicable to First Amendment retaliation claims and the 'adverse action' requirements of both First Amendment retaliation and Title VII cases."[7] Perhaps. However, Respondents Bennett and Reid filed this action on September 28, 2000, and have already faced two interlocutory

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[7] Pet. 16-17.

appeals on qualified immunity, plus further court-ordered briefing on remand. This case has now lingered for 5½ years without a trial. While qualified immunity is an important legal principle, the First Amendment and § 1983 are of little practical use if the federal system fosters delay, after delay, after delay.

Even the District Court has grown weary of Petitioners' dilatory tactics. In an earlier Order, it wrote:[8]

> This is a civil rights action. It is before the Court on Defendants' Motion for Oral Argument [Doc. 231] on their claim of qualified immunity. The Court is generally inclined to grant requests for oral argument. In this case, however, doing so now would only add to the exorbitant delay in getting this case resolved. This case has been pending for three and one-half years. Procedurally, it is in the exact posture it was in after the Court's ruling on the summary judgment motions two years ago. The Court is not persuaded that oral argument would be of significant benefit. The Defendants' Motion for Oral Argument [Doc. 231] is DENIED.

The date of the above-quoted Order was April 14, 2004, more than two years ago. Yet, in terms of reaching trial, this case remains in "the exact posture it was in after the [District] Court's ruling on . . . summary judgment." Respondents respectfully submit that this Court should decline Petitioners' invitation to facilitate additional lengthy delays. Without further delay, Respondents should be permitted to vindicate their First Amendment rights at trial.

STATEMENT OF THE CASE

In 1996, Petitioner Dennis Lee Hendrix was elected Sheriff of Forsyth County, Georgia. At one time, he was the most popular and powerful political figure in that County. Nevertheless, throughout his term in office, Hendrix used the personnel and resources of his Department to engage in

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[8] R16-234-1.

illegal surveillance and harassment of his perceived political "enemies." The individuals targeted included members of the Forsyth County Board of Commissioners, the Mayor of the City of Cumming, Georgia, the publisher of *The Forsyth County News* and local attorneys who filed lawsuits against the Sheriff's Department.[9] Hendrix's targets also included respected citizens such as Bennett and Reid, who Hendrix believed would oppose his reelection.[10]

Hendrix initially focused his illegal actions against County Commissioners who opposed his budget requests.[11] However, in 1998 a group of private citizens, including Bennett and Reid, formed a committee to sponsor a referendum to establish a countywide police force in Forsyth County.[12] The committee was formed under the name "Forsyth Citizens for Economical Law Enforcement," and was registered according to Georgia law.[13] If the proposed resolution had been approved by the voters in a referendum,

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[9] *See*, review of the evidentiary record in *Plaintiffs' Memorandum of Law in Opposition to Defendants Dennis Lee Hendrix, Earl A. Singletary, David W. Waters and John Does (1-10)'s Motion for Summary Judgment* (R10-141-8-133).

[10] Bennett is a licensed engineer, and an owner of a general contracting construction company. Reid owns a grading company. Bennett and Reid have also been partners in a number of successful real estate developments in Forsyth County. Both men are also founders and directors of The Citizens Bank of Forsyth County. Respondents' 11th Cir. Brief at 13. At his deposition, Hendrix admitted that he never believed Bennett or Reid were "criminals." Hendrix also admitted that, other than an investigation of Reid for an alleged violation of an environmental ordinance, which Respondents contend was pretextual and was dropped after the 2000 Sheriff's election, there was never any criminal investigation of Bennett or Reid during his term. R10-141-115-121.

[11] Respondents' 11th Cir. Brief at 9-10, 12-13.

[12] *See*, *O.C.G.A.* § 36-8-1(a) and (b), which are reproduced at **Appendix A** (p. 1a-2a).

[13] *See*, *O.C.G.A.* § 21-5-30(a), which requires the registration of any "campaign committee" organized to bring about the approval or rejection of any proposal by means of a referendum.

it would have transferred much of the Sheriff's general law enforcement power to the new police force. However, the referendum was defeated in the Summer of 1998.

Major Mark Thomas, a former member of Hendrix's Command Staff who at one time acted as Hendrix's "bodyguard," testified that after the 1998 referendum Hendrix refocused his illegal actions against the citizens who had supported it, principally Bennett and Reid. Thomas testified that at numerous Command Staff meetings Hendrix referred to Bennett and Reid as "thugs" and "criminals."[14] On several occasions, Hendrix stated that he would do "whatever he had to" in order to "dig up some dirt" on Bennett and "run him out" of Forsyth County. Thomas testified that Hendrix made such threats in at least four or five Command Staff meetings, and on numerous other occasions. Thomas further testified that Hendrix's animosity toward Bennett and Reid was directly related to their support of the 1998 referendum.[15] Thomas also testified that, after he left the Department, he learned from other Deputies that Bennett and Reid were on the "list of people that surveillances were being done on."[16]

A second former Deputy, Lt. William Miller, also provided important testimony in this case. Miller testified that at a Command Staff meeting on February 9, 1999 Petitioner Earle Singletary, as Chief Deputy Sheriff, announced in Hendrix's presence that Miller would be transferred to the Internal Affairs Division ("IAD"), and would be working under Petitioner David Waters, who was also being transferred to IAD.[17] Singletary stated that Miller's job at IAD would be to head up a "Strike Force" that was going to "investigate 50-75 residents of Forsyth

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[14] Thomas Affidavit ¶'s 4-7 (R12-143-Tab 19); Thomas Depo. p. 45, l. 16-p. 47, l. 15; p. 107, l. 4-19 (R11-142-Tab 3). This is confirmed by Petitioner Waters' testimony. Waters Depo. p. 123, l. 5-16; p. 174, l. 18-p. 175, l. 8 (R11-142-Tab 11).

[15] Thomas Depo. p. 38, l. 24-p. 39, l. 14 (R11-142-Tab 3).

[16] Thomas Depo. p. 76, l. 21 – p. 77, l. 5 (R11-142-Tab 3).

[17] Miller Affidavit ¶'s 6-10 (R12-143-Tab 20).

County who might be opposed to Sheriff Hendrix's reelection." Singletary also announced that Miller would operate the "Strike Force" under Waters' supervision at IAD.[18]

Miller refused to accept this assignment and resigned from the Sheriff's Department on February 12, 1999.[19] Miller's testimony regarding the formation of the Strike Force prior to the 2000 Sheriff's election is corroborated by consistent contemporaneous statements that he made to Cumming Police Chief Buck Jones,[20] and by Deputies Brian Millard and Daniel Rush, who both testified that the formation of the Strike Force was widely known among experienced Deputies in the Department.[21] The retaliatory actions directed by Petitioners through the Strike Force and otherwise, as summarized by the District Court, have already been noted. The additional evidence supporting Respondents' allegations includes more than 30 depositions and 21 affidavits, and is reviewed in detail in Respondents' summary judgment brief.[22]

REASONS FOR DENYING THE PETITION

Contrary to Petitioners' argument, there is no "circuit split" over the application of the "ordinary firmness" test. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have now all adopted that test. Moreover, the First Circuit has applied an identical test to retaliation claims without attaching the "ordinary firmness" label. As shown *infra*, Petitioners' argument that such a split exists is based on conflicting

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[18] Miller Depo. p. 142, l. 18 – p. 143, l. 8; p. 91, l. 9 – p. 92, l. 4; p. 94, l. 2 – p. 95, l. 12 (R11-142-Tab 10).

[19] Miller Affidavit ¶'s 11-12 (R12-143-Tab 20).

[20] Jones Affidavit ¶'s 4-8 (R12-143-Tab 5).

[21] Millard Affidavit ¶'s 13-18 (R12-143-Tab 6); Rush Affidavit ¶'s 8-13 (R12-143-Tab 7).

[22] *See, Plaintiffs' Memorandum of Law in Opposition to Defendants Dennis Lee Hendrix, Earl A. Singletary, David W. Waters and John Does (1-10)'s Motion for Summary Judgment* (R10-141-8-133).

statements by the Second Circuit regarding the factual contexts in which it will apply the "ordinary firmness" test. Petitioners also attempt to bolster their argument with disparate analogies extracted from case law dealing with public employee retaliation claims and Fourth Amendment standing.[23] However, such issues are inapposite in analyzing the "adverse action" element of retaliation claims by private citizens. Simply stated, Respondents submit that none of this amounts to a "circuit split" that justifies this Court's intervention.

There also is no merit to Petitioners' argument that their retaliatory actions did not violate "clearly established" law. Both this Court and the Eleventh Circuit have broadly proscribed such retaliation in numerous decisions that predate Petitioners' deliberate misconduct. Moreover, prior Eleventh Circuit decisions applied an objective standard to retaliation claims that is consistent with the "ordinary firmness" test. Because Petitioners had "fair warning" that their actions would violate Respondents' constitutional rights, the relevant federal law was "clearly established." As the Eleventh Circuit observed in this case:[24]

> Because this Court has held since at least 1988 that it is "settled law" that the government may not retaliate against citizens for the exercise of First Amendment rights, *Ga. Ass'n of Educators*, 856 F.2d at 145, we hold that the defendants were on notice and had "fair warning" that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs' constitutional rights and, if the plaintiffs' allegations are true, would lead to liability under § 1983.

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[23] Pet. App. 9a-12a.

[24] Pet. App. 17a.

I. There is No Circuit Split on the Question Presented.

A. Overview of First Amendment Retaliation Claims.

The federal courts have long held that the First Amendment proscribes not only prior restraints on protected activity, but also governmental retaliation for the exercise of such freedoms. *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state"); *Leslie v. Ingram*, 786 F.2d 1533, 1537 (11th Cir. 1986) ("[a]n intentional and wrongful retaliation for the assertion of a constitutionally protected right is a substantive civil rights violation which may be prosecuted in a federal court pursuant to 42 *U.S.C.* § 1983 . . . "), *abrogated on other grounds by Graham v. Connor*, 490 U.S. 386 (1989).

Three elements must be shown to establish a retaliation claim. First, the conduct in question must be protected under the First Amendment. Secondly, the alleged retaliatory acts must have an adverse effect on the protected conduct. Thirdly, there must be a causal connection between the protected conduct and the adverse action. *Suarez Corp. Industries v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). This is precisely the test that the District Court applied in upholding Respondents' retaliation claim.[*]

The issue presented by the Petition relates only to the "adverse action" element. The federal courts have held that determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory action is "a fact intensive inquiry that focuses on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts." *Suarez*, 202 F.3d 686; *Thaddeus-X v.*

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[*] R14-176-14-18.

Blatter, 175 F.3d 378, 398 (6th Cir. 1999). Accordingly, "prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse." *Id.* at 398. In considering Petitioners' arguments, the Court should keep in mind that Respondents, as private citizens, are entitled to the highest level of protection from retaliation.

B. Development of the "Ordinary Firmness" Test.

The "ordinary firmness" test appears to have originated with Judge Posner's opinion in *Bart v. Telford*, 677 F.2d 622 (7th Cir. 1982). That case upheld a retaliation claim brought by a public employee over a series of relatively minor acts of alleged retaliation. In holding that such minor acts may constitute "adverse action," Judge Posner wrote:

> The effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights, it need not be great in order to be actionable. Yet even in the field of constitutional torts de minimis non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury. It would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise . . . (*Id.* at 625.)

Since its formulation, this test has been adopted by virtually every Circuit. As the Court of Appeals for the District of Columbia noted in *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002), the "ordinary firmness" test has become "[t]he widely accepted standard for assessing whether 'harassment for exercising the right of free speech [is] . . . actionable'," *quoting Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996). *See, e.g.*, *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005) ("[f]or the

reasons that follow, we join our sister Circuits in adopting an objective test for proving a retaliation claim"); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005); *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003) ("[t]he ordinary-firmness test is well established in the case law"); *Meyers v. Nebraska HHS*, 324 F.3d 655, 659 (8th Cir. 2003); *Mitchell v. Horn*, 318 F.3d 523 (3rd Cir. 2003); *Poole v. Co. of Otero*, 271 F.3d 955, 960 (10th Cir. 2001); *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001); *Rauser v. Horn*, 241 F.3d 330, 333 (3rd Cir. 2001); *Allah v. Seiverling*, 229 F.3d 220, 224 (3rd Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000); *Suppan v. Dadonna*, 203 F.3d 228, 235 (3rd Cir. 2000); *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) ("[a] retaliation claim [requires] . . . an adverse action . . . that would deter a person of ordinary firmness from continuing to engage in that conduct"); *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) ("to prove a claim for retaliation, a plaintiff must establish . . . that the defendant's adverse action . . . would likely chill a person of ordinary firmness"); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982) ("[i]t would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness").

The most often cited benefits of an objective standard are that it "provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights,"[26] and does not "allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity."[27] Such a test also recognizes that the "injury in fact" in such cases is the punishment inflicted on the plaintiff for exercising protected rights, and that injury is not dependent on his response to the punishment. Simply

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[26] Pet. App. 8a.

[27] *Mendocino Environmental Ctr. v. Mendocino Co.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

stated, the "injury in fact" caused by such punishment is real and immediate, regardless of the plaintiff's reaction to it.

Summarizing these benefits in *Constantine*, 411 F.3d at 500, the Fourth Circuit recently wrote:

> We have never held that a plaintiff must prove that the allegedly retaliatory conduct caused her to cease First Amendment activity altogether. The cause of action targets conduct that tends to *chill* such activity, not just conduct that *freezes* it completely. Moreover, such a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight. We believe that an objective standard better instructs public officials as to their obligations under the First Amendment. Thus, for purposes of a First Amendment retaliation claim under § 1983, a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter "a person of ordinary firmness" from the exercise of First Amendment rights. . . . While the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity, it is not dispositive. (Citations omitted.)

C. Petitioners' Response to the Consensus of Case Law Endorsing the "Ordinary Firmness" Test.

Petitioners contend that all of the Circuit Courts that have adopted the "ordinary firmness" test were mistaken. They argue that such an objective test allows a plaintiff to recover who has suffered no "actual injury in fact." Since § 1983 is a tort statute, Petitioners reason, a plaintiff may only recover if he can show that he has actually curtailed his protected activity. To complete their syllogism, Petitioners argue that, because Respondents voted in the 2000 Sheriff's election and made minor campaign contributions

to Hendrix's opponent, as a matter of law they cannot show an "actual chilling."

Because voting and making campaign contributions represent minimal First Amendment activities, Petitioners would, in effect, require a plaintiff to show a complete cessation of protected activity in order to assert a retaliation claim. Petitioners adamantly deny that they are advocating a "complete cessation" standard.[26] However, the only post-retaliation protected activity that Petitioners can point to is that Respondents voted in 2000 and made minor campaign contributions to Hendrix's opponent. If such minimal activities establish as a matter of law that Respondents' rights were not chilled, Petitioners are certainly advocating a "complete cessation" test in fact, if not in name.

Such a draconian standard is not supported by any federal decision. *See, e.g.*, *Constantine*, 411 F.3d at 500 ("[w]e have never held that a plaintiff must prove that the alleged retaliatory conduct caused her to cease First Amendment activity altogether"); *Keenan v. Tejada*, 290 F.3d 252, 260 (5th Cir. 2002) ("[a] required showing of actual injury does not . . . mean that a plaintiff must cease criticizing government officials altogether . . . to have a claim for retaliation"). Moreover, as Respondents noted in their Eleventh Circuit brief, the protected activity in question was not voting or making campaign contributions. It was supporting public initiatives such as the 1998 referendum, and the record is clear that after Petitioners' retaliation Respondents never again engaged in such

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[26] *See*, Petitioners' 11th Cir. Reply Brief at 2, where they state:

> Nor have Appellants argued, as Appellees incorrectly state, that there must be a complete cessation of First Amendment conduct for a plaintiff to have a viable retaliation claim. Rather, Appellants' position is simply that . . . a plaintiff is required to show that the defendants' actions had *some* actual, non-speculative chilling effect on the plaintiffs' First Amendment rights . . .

activity.[29] Thus, if applied with respect to the correct protected activity, Respondents meet even Petitioners' incorrect "complete cessation" test.

D. Petitioners Mischaracterize the Case Law In Order to Argue That There is a Circuit Split.

The fulcrum for Petitioners' argument is their contention that "the Eleventh Circuit's decision is in conflict with decisions of the First and Second Circuits, which have applied the 'actual chilling' test."[30] However, an analysis of the cases cited by Petitioners shows that they cannot reasonably be construed as creating a circuit split. For example, Petitioners point to *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989), to support their contention that the First Circuit is aligned with them. However, as the Eleventh Circuit noted, *Sullivan* does not actually support this contention. In its opinion, the Eleventh Circuit wrote:[31]

> The defendants also cite *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989), as adopting an "actual chill" standard. However, the plaintiff there failed to allege any adverse action, and thus could not show sufficient injury to create standing. *Id.* at 4. Moreover, the court noted that the proper standard was whether the plaintiff's "speech was in fact chilled *or intimidated*." *Id.* Therefore, we do not read *Sullivan* to adopt unequivocally a subjective test.

Moreover, in other cases the First Circuit has applied the "ordinary firmness" test's objective standard. In a case decided three years after *Sullivan*, the First Circuit upheld a retaliation claim by a landowner based on the denial of a permit to build a residential complex. *Nestor Colon Medina & Sucesores v. Custodio*, 964 F.2d 32 (1st

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[29] Respondents' 11th Circuit Brief at 45.

[30] Pet. 7.

[31] Pet. App. 18a, n. 4.

Cir. 1992). On summary judgment, the First Circuit held that allegations of a material adverse action (denial of the permit) were sufficient to support a retaliation claim without requiring the plaintiff to show that he had curtailed his protected activities. *Id.* at 41.

In *Agosto-de-Feliciono v. Aponte-Roque*, 889 F.2d 1209, 1218-20 (1st Cir. 1989), the First Circuit also applied an objective standard to a public employee's retaliation claim. Citing *Bart v. Telford*, the First Circuit stated that the "adverse action" element was present "only when the government's actions are sufficiently severe to cause reasonably hardy individuals to compromise their political beliefs and associations." *Id.* at 1217. Respondents submit that the First Circuit's "reasonably hardy individuals" language is the "ordinary firmness" test. Thus, Petitioners' contention that the case law of the First Circuit supports their argument is, at best, an exaggeration.

Petitioners' "circuit split" argument ultimately rests on certain conflicting statements by the Second Circuit. It appears that the Second Circuit first endorsed the "ordinary firmness" test in 1999 in *Davidson v. Chestnut*, 193 F.3d 144 (2nd Cir. 1999). On appeal from summary judgment, the Second Circuit noted that neither party had raised the issue of whether the alleged retaliation was *de minimis*, and suggested that the District Court's final judgment should address this question. *Id.* at 150. The Second Circuit cited the "ordinary firmness" test as the standard under which it would eventually review this issue. *Id.*

Davidson involved a prisoner's retaliation claim. However, in endorsing the "ordinary firmness" test, the Second Circuit did not distinguish prisoner claims from retaliation claims by other plaintiffs. Later Second Circuit decisions involving prisoner claims cited *Davidson* and applied the "ordinary firmness" test, but also did not distinguish prisoner claims from retaliation claims by other plaintiffs. *Davis v. Goord*, 320 F.3d 346, 353 (2nd Cir. 2003); *Dawes v. Walker*, 239 F.3d 489, 493 (2nd Cir. 2001). The Second Circuit also later extended the "ordinary

firmness" test to retaliation claims by public employees. *Hoyt v. Andreucci*, 433 F.3d 320, 328 (2nd Cir. 2006); *Morrison v. Johnson*, 429 F.3d 48, 51 (2nd Cir. 2005); *Washington v. County of Rockland*, 373 F.3d 310, 320 (2nd Cir. 2004).

It was in *Gill v. Pidlypchak*, 389 F.3d 379 (2nd Cir. 2004), that the Second Circuit suggested that the older "actual chill" line of cases that Petitioners rely on might have survived its adoption of the "ordinary firmness" test, at least in one context. *Gill* was a pro se retaliation case brought by a prisoner against correction officers. On appeal from a Rule 12(b)(6) dismissal, the defendants argued that both the "actual chill" test and the "ordinary firmness" test must be applied to such claims. *Id.* at 381. Rather than holding that the "ordinary firmness" test had supplanted its earlier "actual chill" line of cases, the Second Circuit engaged in a hypothetical analysis of three alternative approaches under which it might resolve this apparent conflict. *Id.* at 381-84.

Ultimately, the Second Circuit decided not to adopt any of these three approaches, and instead left this issue unresolved. After analyzing each alternative, the Second Circuit stated:[22]

> We need not, however, choose among these various possibilities to decide the case before us today. Our holding does not depend on an analysis particular to any of them, for our undertaking here is "merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). And under each approach, this plaintiff has articulated a First Amendment retaliation claim sufficient to survive defendants' motion to dismiss.

Later Second Circuit cases have suggested that the "actual chill" test may still apply to retaliation claims by private citizens, despite that Court's adoption of the

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[22] 389 F.3d at 384.

"ordinary firmness" test for prisoner and public employee claims.[23] However, with due respect to the Second Circuit, it is illogical even to consider imposing a more stringent test on retaliation claims by private citizens than on claims by prisoners and public employees. As other Circuits have noted, this is not a static inquiry but depends "on the status of the speaker, the status of the retaliator [and] the relationship between the speaker and the retaliator." *Suarez*, 202 F.3d at 686. In the prisoner and public employee contexts, there are substantial governmental interests that must be balanced against the plaintiff's First Amendment rights. Such countervailing interests simply do not apply to retaliation claims by private citizens. Therefore, the federal courts have consistently held that "prisoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens, before an action taken against them is considered adverse." *Thaddeus-X*, 175 F.3d at 398.

Even the Second Circuit decisions that apply the "ordinary firmness" test recognize this tiered approach to First Amendment protection. In *Davis v. Goord*, 320 F.3d at 353, the Second Circuit wrote:

> "Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action for a claim of retaliation." *Dawes*, 239 F.3d at 493. *See also Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) (retaliation against an inmate must be likely to "chill a person of ordinary firmness from continuing to engage" in a protected activity). "Otherwise the retaliatory act is simply *de minimis* and therefore outside the ambit of constitutional protection." *Dawes*, 239 F.3d at 493. In making this determination, the court's inquiry must be "tailored to the different circumstances

[23] Pet. 9-10. Respondents note that virtually all of the post-*Gill* decisions cited by Petitioners are unpublished opinions.

> in which retaliation claims arise," ***bearing in mind that "[p]risoners may be required to tolerate more . . . than average citizens, before a [retaliatory] action taken against them is considered adverse."*** *Id.* (*quoting Thaddeus-X*, 175 F.3d at 398). (Emphasis supplied.)

See, also, Dawes, 239 F.3d at 493 ("[t]he objective inquiry is not 'static across contexts,' . . . '[p]risoners may be required to tolerate more than public employees, who may be required to tolerate more than average citizens' . . . " (citations omitted)).

Thus, a two-headed test under which prisoners and public employees are protected against the *potential* suppression of their protected activities, while private citizens are protected only where such activities have *actually* been suppressed, conflicts with the fundamental precept that private citizens are entitled to the highest level of First Amendment protection. In this case, the Eleventh Circuit also recognized the paradoxical consequences of such a test and stated:[34]

> We note that several courts have applied the "ordinary firmness" test even in the prison context. It follows that a private citizen, not subject to the expected deprivations of prison life, deserves at least as much protection from retaliation. (Citations omitted.)

For the Court's present purpose, the point is simply that the uncertainty in the Second Circuit engendered by *Gill v. Pidlypchak* does not rise to the level of a circuit split. Accordingly, the Court should not grant certiorari to resolve a nonexistent split. Respondents also respectfully submit that, if the Court wishes to resolve the uncertainty within the Second Circuit's decisions, it would be more appropriate to do so in a Second Circuit case.

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[34] Pet. App. 19a, n. 6.

II. Certain Other Issues Raised by Petitioners Are Simply Irrelevant.

To buttress their "circuit split" argument, Petitioners also argue by analogy to cases that address different legal issues. For example, Petitioners cite the Court's holding in *Laird v. Tatum*, 408 U.S. 1 (1972), that a plaintiff must allege more than a "mere subjective chill." However, the issue in *Laird* was whether a plaintiff who had not been individually surveilled by the government had standing to assert a Fourth Amendment claim.[35] Here Respondents allege that they were individually targeted and retaliated against by Petitioners, and therefore they clearly meet *Laird*'s test for standing. *Meese v. Keene*, 481 U.S. 465, 473 (1987) (allegation of harm to "personal, political and professional reputation" satisfies *Laird's* standing requirement); *Riggs v. City of Albuquerque*, 916 F.2d 582, 584-86 (10th Cir. 1990) (lawyers and political activists who were targets of illegal surveillance by intelligence unit of city police department in connection with mayoral election had standing under *Laird* and *Meese v. Keene*).

Therefore, Petitioners' argument that "the 'actual chilling' test is consistent with the injury-in-fact requirement of federal justiciability law ... [and] *Laird v. Tatum*"[36] is misplaced. Petitioners' contentions are neither consistent nor inconsistent with *Laird*. The two cases present different issues.

In their Eleventh Circuit brief, Petitioners also argued by analogy to public employment decisions from the Eleventh Circuit such as *Stavropoulos v. Firestone*, 361 F.3d 610, 616 (11th Cir. 2004), *cert. denied*, 161 L. Ed.2d 727, 125 S. Ct. 1850 (2005). *Stavropoulos* reaffirmed that,

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[35] In a First Amendment retaliation case, the plaintiff would have to prove a causal connection between the protected activity and the retaliation as part of his prima facie case. Therefore, by definition, all such First Amendment plaintiffs must have been individually targeted, and satisfy *Laird*.

[36] Pet. 16.

in order to state a retaliation claim, a public employee must show an "adverse employment action."[37] However, it is well established that in the public employment context the interests of the governmental employer must be balanced against the First Amendment rights of the employee. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Recognizing this, the Eleventh Circuit held that "[t]he defendants' reliance on retaliation cases in the public employment context is misplaced, because different interests are at stake there."[38] Thus, neither *Laird* nor the public employee cases actually strengthen Petitioners' argument.

III. In This Case, Respondents Meet Any Potential "Adverse Action" Test, and Have Unquestionably Incurred an Actionable Injury.

As part of their argument, Petitioners represent that:[39]

> Respondents have produced no legally sufficient evidence indicating any actual change or curtailment of their First Amendment activities as a result of Petitioners' alleged conduct. In fact the evidence shows just the opposite: that Respondents continued to exercise their First Amendment rights in spite of Petitioners' alleged retaliatory conduct.

Petitioners have mischaracterized the evidentiary record. In actuality, the record shows that Respondents were "chilled" in the exercise of their First Amendment rights, and that they meet any potential "adverse action" test the courts may apply.[40] Both Bennett and Reid testified that

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[37] Petitioners' 11th Cir. Brief at 12-13 and Petitioners' 11th Cir. Reply Brief at 21, 22-23.

[38] Pet. App. 9a.

[39] Pet. 13-14.

[40] Respondents' 11th Cir. Brief at 44-45.

Petitioners' retaliation made them less likely to engage in protected activity such as the 1998 referendum. For example, Bennett testified:[41]

> Q Let me ask you if your experience with the surveillance and the activity by Sheriff Hendrix that you allege in your Complaint and the brochures, let me ask you if that has made you less willing or unwilling to be involved with political process?
>
> A Absolutely.
>
> Q Has it made you more reluctant to get involved in political issues and voice your opinion on political issues?
>
> A Yes.

Petitioners scoff at Respondents' testimony, labeling it "self-serving, speculative, and conclusory."[42] However, Petitioners fail to inform the Court that Respondents' testimony is indistinguishable from testimony that the Fifth Circuit held sufficient to show an "actual chill" in a case relied upon by Petitioners. In *Keenan v. Tejada*, 290 F.3d at 260, the Fifth Circuit wrote:

> The district court clearly erred, however, in finding that the plaintiffs made no showing of an injury. In his affidavit, Keenan explained that after the incidents in June 1997 and December 1997, he was afraid to travel in Precinct 5 and he "backed off from direct involvement in helping expose unlawful practices" in the constable's office . . . Przybylski made similar assertions in his affidavit. ***Thus, both plaintiffs have stated, without contradiction, that they curtailed their protected speech activities in response to the defendants' actions . . . A required showing of actual injury does not necessarily mean that plaintiffs must cease criticizing the government officials***

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[41] Bennett Depo. Tr. p. 278, l. 23 – p. 279, l. 7 (R11-142-Tab 2).

[42] Pet. 14, n. 5.

> ***altogether in order to have a claim for retaliation***. (Citations omitted; emphasis supplied.)

It is also illogical for Petitioners to argue for a subjective test, and then insist that the victims' testimony regarding their reaction to the retaliation must be disregarded. Petitioners can't have it both ways. Moreover, in many retaliation cases the only evidence available to establish an "actual chill" is the victim's testimony. Indeed, one serious flaw in a subjective test is that it gives the courts no guidelines to divine the metaphysical question: which protected activities did the victim *not* engage in?

To support their argument, Petitioners point solely to the fact that Respondents voted and made minor campaign contributions to Hendrix's opponent in the 2000 election. As noted *supra*, that is the wrong protected activity. Petitioners' retaliation was not in response to Respondents' voting or campaign contributions. It was in direct response to Respondents' support of a public referendum initiative that Hendrix opposed, and the record shows that neither Bennett nor Reid have engaged in similar activity after Petitioners' retaliation.[43] Therefore, as applied to the correct protected activity, Respondents meet even Petitioners' incorrect "complete cessation" test. Respondents also submit that any test under which a private citizen forfeits his First Amendment protection simply by voting and making minor campaign contributions is inherently wrong.

However, the most glaring defect in Petitioners' argument is that it ignores the fact that a First Amendment retaliation claim may be based on an injury other than the actual or likely suppression of the plaintiff's protected activities. As the Second Circuit wrote in the case on which Petitioners principally rely, *Gill v. Pidlypchak*, 389 F.3d at 383:

> Indeed, even in certain cases involving public official/private citizen retaliation claims, we have

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[43] Respondents' 11th Cir. Brief at 45, and n. 31.

> seemingly not imposed a subjective chill requirement where some other harm is asserted ... Under this approach, standing is no issue whenever the plaintiff has clearly alleged a concrete harm independent of First Amendment chilling. It is only a problem where no harm independent of the First Amendment is alleged. For there, the only injury is the chilling itself.

In this case, the District Court has already held that Respondents submitted competent summary judgment evidence to establish such independent "concrete harm":[44]

> In his affidavit and deposition testimony, former Deputy Mark Thomas testified that in command staff meetings beginning around the time of the 1998 Referendum, Hendrix repeatedly referred to Plaintiffs as "criminals" and "thugs" and vowed to drive them out of Forsyth County. Allen and Cunard[45] testified that at least three of the construction inspectors under their supervision expressed the opinion that Lockhart was targeting, or "leaning heavy", on projects where Bennett and/or Reid were involved. (Deposition of Tim Allen, pp. 55-56, 105-106; Deposition of John Cunard, p. 35). Also, Plaintiff Reid testified in his deposition about specific problems that the Defendants' actions caused with Nix-Fowler, the general contractor on a project which Defendant Lockhart often targeted. (Deposition of Danny Reid, pp. 22, 24-25, 195). Reid also testified that after Lockhart's investigation began, Nix-Fowler had several jobs in Forsyth County that the company did not ask Plaintiff Reid to bid on. (Deposition of Danny Reid, pp. 27-28). He further stated that a draw check was held by Nix-Fowler for a period after Lockhart sent a letter to that company alleging

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[44] R14-176-43.

[45] Tim Allen and John Cunard are, respectively, the Assistant County Engineer and County Engineer of Forsyth County. *See*, R11-142-Tabs 16 and 17.

> that Reid was engaged in "open dumping" of the recovered asphalt from an investigated construction site. (Deposition of Danny Reid, pp. 27, 28). Plaintiffs submit, as Reid's testimony indicates, that Lockhart's actions retarded and made the performance of Reid's obligations under the contract with Nix-Fowler more difficult, causing a draw to be withheld and costing Reid the promised opportunity to bid on future projects with Nix-Fowler in Forsyth County. Defendants point out in their brief that there was no damage to Reid's relationship with Nix-Fowler because "Plaintiff Reid's testimony shows he still works for Nix-Fowler." (Defendant Lockhart's Brief in Support of his Motion for Summary Judgment, p. 14). However, the testimony cited in Lockhart's Brief shows that as of the date of Plaintiff Reid's deposition, he was finishing up the previous project for Nix-Fowler that was the target of Lockhart's investigation. Reid's actual testimony, as set out above, was that he believed that Lockhart's actions damaged his relationship with Nix-Fowler to the point that the company backed off of its promise to work with him on future projects in Forsyth County.

Based on this evidence, the District Court upheld Respondents' state law claims for tortious interference with contractual and business relations. The record further shows that, as the result of Petitioners' retaliation: (1) both Bennett's and Reid's businesses were damaged,[46] (2) Bennett and Reid experienced difficulty in obtaining public support for rezoning in connection with their development projects,[47] and (3) a complaint was filed with the Georgia Department of Banking and Finance ("DBF")

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[46] Bennett Depo. Tr. p. 65, l. 7 – p. 66, l. 19 (R9-120); p. 171, l. 9 – p. 172, l. 6 (R11-142-Tab 2); Reid Depo. Tr. p. 17, l. 4 – p. 18, l. 1; p. 107, l. 9 – p. 108, l. 12; p. 118, l. 21 – p. 119, l. 3; p. 123, l. 8 – p. 125; l. 9; p. 129, l. 6-12 (R11-142-Tab 4).

[47] Bennett Depo. Tr. p. 65, l. 7 – p. 66, l. 9 (R9-120).

regarding Bennett's and Reid's positions as directors of The Citizens Bank of Forsyth County, which led to a DBF investigation.[48]

For example, Bennett gave the following testimony:[49]

> Q In what way has Hendrix or Singletary or Waters gone after you and Mr. Reid in the lawful pursuit of your business interests?
>
> A Well, goodwill is a big part of my business. Most of it's negotiated work. We started out in 1987, we did bid work until about probably 1989, and from then on everything we got was negotiated.
>
> For people to negotiate with you, they can't get a flier from the sheriff saying you're a criminal. I mean, that's part of the goodwill part of being able to negotiate a contract.
>
> We've had to go out and basically work in other counties. We're working in Dawson County and our volume has went down as a result of people thinking we're criminals.
>
> Q Name somebody. Because earlier I thought you said you didn't know somebody.
>
> A Name somebody, what?
>
> Q That you've lost business from or that you weren't allowed to do business for because . . . of these fliers.
>
> A I think what I just said is I have to go outside the county to work; I mean I'm having to work in Dawson County. My volume has went down. The people that I don't get contracts with are people that I never hear from.
>
> There's instances where we're trying to buy a piece of property from – we're trying to get a piece of property re-zoned and Mr. Reid goes and talks to this lady and says, "We want to get this

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[48] *See*, Affidavit of Timothy M. Perry, R12-143-Tab 16.

[49] Bennett Depo. Tr. p. 65, l. 7 – p. 66, l. 19 (R9-120).

> property re-zoned," and she says, "Well, I don't want to deal with you because your partner is a crook." He says, "Who?" "Danny Bennett, he's a crook. I don't want to deal with him."
>
> So here we are trying to get something re-zoned, and we can't do it because people think we're criminal.

Given this record, Petitioners' contention that Respondents suffered no actionable injury as the result of their retaliatory actions borders on frivolous.

IV. The Law Was "Clearly Established" at the Time of Petitioners' Retaliation.

Petitioners' argument that the law was not "clearly established" at the time of their retaliation against Respondents also has no merit. The Eleventh Circuit held that it is "settled law" that the "government may not retaliate against citizens for the exercise of First Amendment rights,"[50] and that, at the time Petitioners retaliated against Respondents, that principle applied with "obvious clarity," and gave Petitioners' "fair warning" that their actions would violate Respondents' constitutional rights.[51] *Vinyard v. Wilson*, 311 F.3d 1340, 1350-52 (11th Cir. 2002) (where a constitutional right is established with "obvious clarity," a plaintiff need not point to factually similar cases to defeat qualified immunity).

Even Petitioners cannot directly dispute the Eleventh Circuit's conclusion. Instead, they circumvent it by presupposing that if the Eleventh Circuit had not yet adopted the "ordinary firmness" test, the law could not be clearly established. They then argue by analogy to cases in which the law truly was unsettled. *E.g.*, *Wilson v. Layne*, 526 U.S. 603 (1999). However, there are at least two basic flaws in this argument.

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[50] Pet. App. 17a.

[51] Pet. App. 16a.

First, the test for qualified immunity is not whether every legal nuance that might apply to a defendant's conduct was immutably fixed at the time he acted. It is simply whether "in light of already-existing law, the unlawfulness of the conduct is 'apparent' "[52] to a reasonable officer in the defendant's circumstances.[53] Petitioners do not dare to suggest that a reasonable officer would have believed that their actions were lawful. Instead, they circuitously argue that if a Sheriff and his senior deputies are contemplating political retaliation and correctly guess that the targeted citizens will vote anyway, then it is "objectively reasonable" for them to proceed with the retaliation.[54] However, this argument conflicts with this

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[52] Pet. App. 16a.

[53] A leading treatise on § 1983 frames this test as follows:

> It is obviously to the advantage of plaintiffs to approach the clearly settled law inquiry at a general level, and to the advantage of defendants to approach it at a fact-specific level. After *Anderson v. Creighton*, it must now be approached at a fairly fact-specific level, but a case on all fours is not required. In making this inquiry, courts determine the extent to which the relevant constitutional doctrine is developed in the context of similar or analogous fact patterns. What should be uppermost here is one of the purposes of the qualified immunity defense: fair warning to potential defendants who should not have to predict constitutional law developments. Thus, the clearly settled law inquiry after *Anderson* is a practical as well as a legal one: would a reasonable person in defendant's situation have known that he or she was violating constitutional law? Or, in *Anderson*'s words: "The contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right."

S. Nahmod, *Civil Rights and Civil Liberties Litigation* (4th ed.) § 8.18, at p. 8-61.

[54] *See*, Petitioners' 11th Cir. Brief at 23, where Petitioners argued that "reasonable government officials in [Petitioners'] position would not know that an actionable First Amendment retaliation claim . . . may exist where the evidence shows plaintiffs suffered no 'actual chilling' of their First Amendment rights as a result of their allegedly retaliatory conduct."

Court's precedents because it relies on events that occur after the retaliation, rather than the circumstances that exist at the time of the defendant's actions.

Second, Petitioners' argument ignores the fact that the Eleventh Circuit has long applied an objective standard in First Amendment retaliation cases. The Eleventh Circuit recognized this, and wrote:[55]

> As a final reason for approving of the objective standard, we note that it is consistent with statements in our own cases, even though we have not explicitly adopted the "ordinary firmness" test. In *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983), we enjoined a malicious prosecution action filed by state officials in retaliation against a citizen's lawsuit against those officials. *Id.* at 1190. We noted that "petitioner-appellant alleges more than that his freedom to exercise his right to petition will be chilled in the future. He alleges current deprivation, in the form of penalization of having exercised his right to petition in the past." *Id.* at 1188. We went on to state, "this does not mean, however, that only if a plaintiff can prove actual, current chill can he prove irreparable injury. On the contrary, direct retaliation by the state for having exercised First Amendment freedoms in the past is particularly proscribed by the First Amendment." *Id.* at 1189. Thus, we did not focus on the plaintiff's subjective, actual chilling. Instead, we objectively assessed the defendants' actions and declared that an actual chill is not necessary to state a First Amendment violation: "The *source* of that chill . . . provides the critical irreparable injury to those citizens, regardless of whether actual chill is proved." *Id. see also Holloman v. Harland*, 370 F.3d 1252, 1268-69 (verbal censure from school official for student's silent protest during recitation of Pledge of Allegiance was a punishment intended

[55] Pet. App. 13a.

> "to dissuade [student] from exercising a constitutional right" and "cannot help but have a tremendous chilling effect on the exercise of First Amendment rights").

The Eleventh Circuit's conclusion was exactly right. Petitioners' argument also fails because they had "fair warning" under prior decisions such as *Cate* and *Ga. Assn. of Educators* that the Eleventh Circuit applies an objective standard to First Amendment retaliation claims. "Fair warning" is all that was required in order for the law to be "clearly established." *Hope v. Pelzer*, 536 U.S. 730 (2002). Tellingly, Petitioners cite no case in which the Eleventh Circuit applied an "actual chilling" test, much less the de facto "complete cessation" test that they urge this Court to adopt.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

O.C.G.A. § 36-8-1(a) and (b)

(a) The county governing authority shall have authority to elect or appoint such number of county police as in its discretion it deems proper, provided that the county governing authority complies with the provisions of this Code section. Any person elected or appointed to the county police shall possess the qualifications prescribed in Code Section 35-8-8.

(b)(1) Each county governing authority may authorize, through proper resolution or ordinance, the creation of a county police force. No resolution or ordinance adopted pursuant to this paragraph shall become effective until the governing authority of the county has submitted to the qualified electors of the county the question of whether the resolution or ordinance shall be approved or rejected. The county governing authority shall establish the date of the election in compliance with Code Section 21-2-540, which shall be not less than 30 days after the call of the election, and shall notify the county election superintendent of its decision as to the date. The election superintendent shall issue the call for the election and shall specify that the election shall be held on the date determined by the county governing authority. The election superintendent shall cause the date and purpose of the election to be published once a week for two weeks immediately preceding the date thereof in the official organ of the county. The ballot shall have written or printed thereon the following:

> "( ) YES Shall the resolution or ordinance adopted by the governing authority of (Name of County) to create a
>
> ( ) NO county police force be approved?"

(2) Those persons desiring to vote in favor of the creation of a county police force shall vote "Yes," and those persons opposed to the creation of a county police force shall vote "No." If more than one-half of the votes cast on the question are in favor of the creation of a county police force, then the county governing authority shall be authorized to create a county police force pursuant to the provisions of this chapter; otherwise, a county police force shall not be created. If the resolution or ordinance is rejected by the qualified electors, the question of the creation of a county police force may not again be submitted to the voters of the county within 48 months immediately following the month in which such election was held. The county election superintendent shall hold and conduct the election under the same rules and regulations as govern special elections, except as otherwise provided in paragraph (1) of this subsection. He shall canvass the returns and declare and certify the result of the election to the Secretary of State. The expense of any such election shall be borne by the county wherein the election was held.